INHERITANCES IN FAMILY LAW

CASE LAW OVERVIEW AND 2018 UPDATE

"From Bonnici to Holland and beyond"

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INTRODUCTION

Any student or practitioner of family law in the last 25 years will most likely be familiar with a case by the name of "**Bonnici**"[1] which has often been cited (incorrectly, in my view) as support for the general proposition that:

> *An inheritance received late in the marriage could or should be "excluded" from the pool of property otherwise available to be divided under section 79 of the Family Law Act 1975, by reason of the fact that the "non-inheriting" party cannot be regarded as having made a significant contribution to that inheritance.*

This paper will canvas a range of "inheritance" type cases over last 30 years or so, from Bonnici (1991) all the way up to Holland[2] (2018), plus the very recent case of Hurst & Hurst[3] (August 2018). This will be done in an attempt to demonstrate just how much this area of family law jurisprudence has evolved over time — in particular during the last 5 years — and why in my view the above general proposition is no longer sustainable or supportable, having regard to the current state of the law (if it ever was).

There are a number of themes emerging from the case law which assist us in understanding how the court has more recently arrived at a more global and balanced approach when dealing with cases involving recent inheritances, as opposed to the perceived more "black-and-white" style of approach of the past.

In short relationships, significant weight is always given to a large capital contribution. However in the past the court has also tended to give considerable (often disproportionately high) weight to the unilateral contribution of an inheritance by one party, particularly if it was late in the relationship, even in long marriages. Such an approach may have resulted in the non-inheriting party being given *insufficient* credit for all of their other contributions throughout the entirety of the marriage, including their direct or indirect contribution to the other party's inheritance itself.

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[1] [1991] FamCA 86; (1992) FLC 92–272
[2] [2017] FamCAFC 166
[3] [2018] FamCAFC 146

As Kay J put it so memorably and eloquently put it, some years after Bonnici's case: [4]

> …other significant factors aside from the inheritance "ought not be left almost unseen by eyes dazzled by the magnitude of recently acquired capital"

The early approach of the court tended to favour the inheriting party and often resulted in outcomes with significant disparity in terms of what each party received by way of final property settlement.

Things appear to have swung the other way in recent years, insofar as more recent cases seem to favour a more global, balanced approach toward the assessment of contributions (both over the whole period of the relationship, including a post separation AND in respect of the whole of the asset pool, including the inheritance itself).

This newer approach tends to swing the balance back in favour of the non-inheriting party, so that now we are seeing outcomes where there is significantly less disparity between the parties — in terms of the percentage they each get by way of final property settlement — than in the earlier cases involving inheritances.

LEGAL ISUUES AND THEMES

Power to adjust property

1. Under **s.79 of the Family Law Act 1975** ("the Act") the Family Court and other courts exercising jurisdiction under the Act have the power to make orders in relation to alteration of property interests between married parties (and similarly under **s.90SM** in relation to de facto property matters).

2. The relevant portion of s.79 (with s90SM in similar terms) reads as follows (emphasis added):

> **Alteration of property interests**
>
> (1) In property settlement proceedings, the court may make **such order as it considers appropriate**:
>
> (a) in the case of proceedings with respect to the property of the parties to the marriage or either of them--**altering the interests** of the parties to the marriage **in the property**;
>
> (b) …..

[4] **Aleksovski** [1996] FamCA 111 (discussed further below)

The 4 (now 5) step approach

3. In a narrow range of cases, for example where parties have already arranged their affairs by consent and relied on those arrangements over a period of time since separation, the court may decline to exercise the power of adjustment on the basis that it would not be just and equitable to interfere with an existing state of affairs created.[5] It is otherwise well-settled law (eg. Ferraro's case (1993); Hickey's case [2003]; and Omacini's case [2005]) and well known tradition the Court must approach the division of property between parties in four steps, although that can now be regarded as a "**five step approach**", taking into account *Stanford*):

    3.1. Identify all property and financial resources of the parties or either of them;
    3.2. Consider having regard to same, whether it is just and equitable to make a property settlement order at all;
    3.3. Identify and assess financial and non-financial contributions of the parties to the property of the parties as well as contributions to the welfare of the family including in the capacity of homemaker or parent;
    3.4. Identify relevant factors under s.75(2) [or s.90SF(3) for de facto matters] which factors are generally known as the "future needs factors" of each party;
    3.5. Make an order which is overall just and equitable.

Definition of "property" under the Act

4. Under section 4 of the Act, "property " is defined as:

> *(a) in relation to the parties to a marriage or either of them--means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion; or*
>
> *(b) in relation to the parties to a de facto relationship or either of them--means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.*

5. It is important to note that the definition of "property" in the Act as interpreted by the cases includes all the property of the parties or either of them, regardless of how it was acquired or when it was acquired, or in whose name it is owned. [6]

6. Neither s.79, nor the definition in section 4 of the Act, make any attempt to limit the definition of "property" in terms of what is included in the pool and available for division.

5 **Bevan** [2014] FamCAFC 19; **Stanford** [2012] HCA 52 (HC)
6 **Farmer and Bramley** (2000) FLC 93 – 060

Definition of property is wide and non-exclusionary

7. For example the Act **does not say:**
    - only property acquired only up to separation
    - excluding property acquired after separation
    - excluding property to which the other party did not make a contribution
    - excluding unilateral inheritances or gifts received by one party

8. Indeed, the case law [7] tells us that any attempt to "**exclude**" the property of the parties or either of them is legally incorrect and flies in the face of the definition set down in the Act. Any attempt to do so, would be at odds with the obligation of the Court to identify and adjust ALL property of the parties in accordance with ss.79 and/or s90SM.

9. Accordingly, inheritance entitlements or gifts received unilaterally by either party – at any time either during the marriage after separation right up until the making of final property orders – must be included for consideration as part of the property pool available to be divided.

Difference between excluding and quarantining

10. We must be careful with our terminology. The case law tells us that there is a **legally significant difference** between:

    - adopting an "asset by asset" approach, or quarantining assets from each other by type eg. "two pool" approach (eg. Superannuation pool vs non-superannuation pool); whilst still taking into account the contributions of both parties to each asset/pool throughout the marriage and post separation; and

    - excluding assets (such as an inheritance) from the pool and/or from consideration by the court.

In the first scenario, all assets are considered and adjusted having regard (inter-alia) to the contributions of the parties throughout the relationship including post separation – but for convenience they are grouped according to their nature, or to suit the circumstances or facts of the case.

The second scenario however is an erroneous approach at law, insofar as all assets must be actively considered in the 5 step process — and it is not logically possible to do this if one or more of the assets have been excluded from consideration. To "exclude" an asset is to effectively give 100% of that asset to one party, without proper consideration as to what (adverse) impact this might have upon arriving at a just and equitable distribution of the balance of the pool.

[7] **Holland's** case (see footnote 2 and further discussion below)

CASE LAW

11. Some key cases which are relevant to the court's approach in cases involving substantial inheritance contributions, particularly those made late in a marriage or post-separation, as set out below (in roughly chronological order):

12. ***Norbis v Norbis* (1986) 161 CLR 513**

This is leading High Court case deals with the issue of whether, when undertaking the (traditional) 4 step process of property adjustment, the court should adopt a "global approach" to the asset pool or assess each individual asset on an "asset by asset" approach.

The parties had a marriage of 30 years' duration, with one child. The trial judge adopted a "two pools" approach based on assessment of contributions, where the husband received 60% of the value of the first pool and 40% of the value the second pool (and vice versa for the wife). This resulted in a 57/43 overall split in favour of the husband.

The Full Court found in favour of the wife on appeal and ordered an overall 54/46 split in favour of the husband, expressing the view that it served no good purpose in a long marriage where there have been "countless changes of varying degrees in family fortunes generally and of perhaps major assets in particular, to attempt to impart to individual assets different percentages in favour of the parties. At the most any such attempt can only be notional". …" All one can do realistically in such circumstances is to take into account all of the matters to which one is referred to in section 79 (4) of the Act and fix an overall proportion on a global view of the total of the of the assets to be divided"

The High Court on appeal however, held that **both approaches to assessment of contributions (global vs. asset by asset**) are legitimate and it is a matter for the court's discretion:

> *"provided that those who take the global approach heed the warning that the origin and nature of the different assets ought to be considered" AND "that those who favour the more precise approach do not mistake the trees for the forest, i.e. add up their individual items without standing back at the end to review the overall result in light of the needs of the parties".*

13. ***Bonnici & Bonnici*** [1991] FamCA 86; (1992) FLC 92 – 272

This case involved a 17 year marriage where the parties had 2 children, who were 18 and 21 at the time of the appeal. The wife was aged 44 and the husband age 61 at the time of the hearing. The trial judge divided the pool equally between the parties, ordering that the wife retain the former matrimonial home and pay the husband $18,000. The trial judge found that the wife had made a significantly greater contribution than the husband (both financially as an employed nurse and also in terms of the family in her role as primary caregiver), but for the fact that the husband received an inheritance of $500,000 in the year following separation (plus a smaller inheritance of $20,000 before separation) — however this sum had been depleted to less than $300,000 by the time of trial, without clear explanation from the husband as to why. The husband had worked in a restaurant business which declared very little income and he had contributed to the running of the household.

The husband appealed. Although he was found to be a witness who had not provided full disclosure or presented truthfully, the appeal was allowed on the basis that the trial judge gave insufficient reasons for his global finding of equality in terms of property distribution. The appeal was successful. However on appeal the court took the view that, notwithstanding his initial introduction of equity in the family home at the commencement of the relationship, the wife's much greater economic contribution and her contribution as a homemaker and parent (plus all of her unpaid work in the restaurant business), clearly justified a finding of at least equality.

The husband's appeal was nevertheless successful, because the Full Court found that the money received from his uncle by way of inheritance should "not be brought into account". So whilst increasing her contribution-based entitlements on the balance of the pool, this still produced a result where the wife had to make an increased payment of the husband of $33,000 instead of $18,000.

More significant however, was the explanation and rationale set forth by the Full Court in its judgment, for failing to take the husband's inheritance into account in the pool. The comments are more even-handed than perhaps the result of the case itself, which appears to have led to considerable ambiguity in the years since, as to how the case should be interpreted.

Many family lawyers have since argued that **Bonnici's** case stood for the proposition that a late inheritance ought to be excluded, because that was the outcome in that particular case. This is understandable, but I do not think it is correct.

If we look at the statements made by the Full Court in coming to that particular conclusion in this case, we can see that the legal position is actually more nuanced, and not as "black-and-white" as the particular case result might suggest:

> **Nicholson CJ, Nygh and Tolcon JJ**
>
> "…41. **The more difficult issue in this case is as to whether the [inheritance] should be treated differently from other types of property in which the parties clearly have an interest.**
>
> **42. The answer, we consider, must depend upon the circumstances of individual cases**. If, for example, in the present case, there had been no other assets than the husband's inheritance, but the wife had, as his Honour found, clearly carried the main financial burden in the support of a family and also performed a more substantial role as a homemaker and parent than the husband, then it would clearly be open and indeed incumbent upon a Court to make a property settlement in her favour from such an inheritance.
>
> 43. **A property does not fall into a protected category merely because it is an inheritance**. On the other hand, if there are ample funds from which an appropriate property settlement can be made and a just result arrived at, then the fact of a recently acquired inheritance would normally be treated as an entitlement of the party in question.
>
> 44. **The other party cannot be regarded as contributing significantly to an inheritance received very late in the relationship and certainly not after it has terminated, except in very unusual circumstances**. Such circumstances might include the care of the testator prior to death by the husband or wife as the case may be or other particular services to protect a property. See James and James (1978) FLC 90-487. But there was no evidence of this in the present case despite submissions by counsel for the wife to the contrary. **Accordingly, we think that in the present case the monies received by the husband from the sale of the freehold and from his uncle's estate should not be brought into account.**"

[emphasis added]

14. ***GS and TS*** [2005] FamCA 40

This was an appeal to the Full Court by the husband against an order made by Bell J, dividing the property pool of $841,479 in percentages of 90/10 in favour of the wife based on contributions with a further adjustment of 2.5% in favour of the husband on account of section 75(2) factors. This was a 9 year marriage/cohabitation producing 4 children. The husband and wife were 45 years and 43 years of age respectively at the time of the appeal. The husband appealed on the basis the trial judge failed to have proper regard to evidence in

relation to his contributions to two properties and to the welfare of the family. He sought a contributions-based entitlement of 30%.

The parties lived in a home belonging to the wife's parents throughout the marriage. It was noted that the wife's parents allowed the parties to live rent-free in their property for the duration of the marriage and that the grandmother advanced $55,000+ to the parties which had also not been repaid. During the marriage the wife's parents were also very generous, helping them purchase other property and helping the husband commence a business which he still ran. Three years after separation the wife inherited that home, worth about $560,000, where she and the children had remained living at the time of separation. The wife also inherited another property from which she received $204,000 but the parties had agreed to exclude $150,000 of that money and set it aside for the education of the children. The Court found that at the time of separation the parties only had $9000 worth of their own assets and that accordingly, there was a huge increase in assets only after separation by reason of the wife's inheritance.

At the time of hearing the husband had equity of about $30,000 in a property purchased post-separation, some other sundry assets and superannuation of around $50,000. The wife had a vehicle, other sundry assets and superannuation of around $106,000. The Court found that the husband had not paid child support for about five years post separation and had a debt of $13,000 to the child support agency.

The timing and extent of the unilateral financial contributions by the wife of her inheritance post-separation (in a less than 10 year marriage); the extent of the generosity of the maternal family during the marriage (in contrast to the limited joint assets actually retained by the parties jointly as at the date of separation compared to the size of the inheritance); the significant future needs of the wife who had the care of 4 children under 18 and the lack of child support from the husband, all pointed to a settlement weighted heavily in favour of the wife.

15. ***In the Marriage of V and G ALEKSOVSKI - (1996) 20 Fam LR 894; FLC 92-705***

This was a case where the husband's contributions to the 18 year marriage (with a pool of $240,800 net) included contributions via earnings, manual labour in improvements to matrimonial home using monies of $18,400 from an approximately $39,000 retrenchment package received by husband. This retrenchment package was received a couple of years prior to separation, after which he worked casually but was unemployed at the time of the trial. On the other hand, the wife made contributions including damages from personal injuries claim, earnings similar to those of the husband, contributions as homemaker and help from her parents. The wife's personal injuries claim of

$143,000 comprised pain and suffering components of $100,000 which were effectively unilateral contributions by her. Those monies were used to purchase a second property in the years leading up to separation. The children lived with the wife after separation and regrettably did not see the husband. The Court incidentally found that the wife had better prospects of employment after marriage.

The Full Court of the Family Court comprising **Baker, Rowlands and Kay JJ** found that the trial judge erred in apportioning too much weight to contributions of respondent wife and too little weight to contributions of applicant husband and allowed the husband's appeal.

The Court held in relation to the trial Judge's award of 23% to the husband (which required him to make a $25,000 payment to the wife in order to keep one of the properties, in circumstances where he clearly had no borrowing capacity and would receive less than 23% if the property had to be sold, for that reason) that such a result was manifestly unjust "*given the length of the marriage and the contributions which the husband made during the course of it".*

The Court quoted the trial judge with approval in relation to his references to various case law on "contributions", but then criticised the trial judge for going a step further in then treating the wife's larger pre-separation compensation monies as a windfall and attempting to quarantine the asset funded by that contribution, rather than weighing it in the overall scheme of things having regard to the long marriage (and in doing so giving an appropriate weight to it). The following passages are lengthy but very instructive:

> *"In this respect he [the trial judge] referred to the decision of the High Court in* ***Williams v Williams (1985) 61 ALR 215*** *; 10 Fam LR 355 ; [1985] FLC 91-628 FLC 91-628 and cited a passage from that case. The relevant portion of that passage is the following extract, at Fam LR 356 FLC 80,093 :*
>
> > *The short answer to this submission is that when the property available for division between the parties represents an award of damages for pain, suffering and loss of amenity it may be relevant in some situations to have regard to the circumstances relating to that award, but there is no general presumption that the award should be left out of account in determining what orders should be made under s 79 of the Family Law Act 1975.*
>
> *Having discussed the above-mentioned passage, his Honour then said:*
> *As I discussed with counsel during the course of their submissions their Honours' comments are helpful to this extent and that is that it is, one would say, self-evident that money that is received during the course of*

the marriage must represent property that is available for distribution between the parties. What their Honours appear to be saying in Williams' case in my opinion, respectfully, is that if the parties had determined for themselves in an appropriate case that some of those funds should be quarantined then it may be appropriate for that determination of the parties to be taken into account under s 75(2)(o) of the Family Law Act. Their Honours do not say this expressly but it seems to me to be a logical extension of their reasoning.

However even if that were the case that did not occur in this situation in that the sum received by Mrs Aleksovski was not quarantined but was in fact applied in the purchase of jointly owned property being the unit at Thomastown and for family purposes. It is asserted by her that this was done at the insistence of and under, one might infer, the "duress" from the husband. It is unnecessary for my purposes to make any final determination about that issue. It is quite clear that it cannot be said in this case that the parties had determined mutually to isolate the property as belonging to Mrs Aleksovski. In those circumstances the particular, reference made by their Honours in that case is not apposite to a determination of how this contribution should be regarded.

What ***Williams v Williams*** *does not say, however, and it is particularly important for this case is, if the parties have not made a determination to quarantine the property how should the injection of these funds be treated for the purposes of contribution? In my opinion in this case, given the way in which the funds were expended, and given the fact that the funds were received very late in the marriage, in fact, in the year before the parties separated, they must be regarded as essentially a contribution made by Mrs Aleksovski to the family finances.*

In our view, having regard to the facts of this case, his Honour was entirely correct in that the wife's damages award and, in particular, that portion of it which related to pain and suffering, should be regarded as a contribution by her to the marriage and to the family.

Similarly, that portion of a damages award which relates to economic loss, representing income lost during the marriage or period of cohabitation, may also be regarded as a contribution by the party who has suffered the loss.

Authorities such as In the Marriage of Crawford (1979) 25 ALR 82 ; 5 Fam LR 106 ; [1979] FLC 90-647 and 20 Fam LR 894 at 903; In the Marriage of White (1982) 8 Fam LR 512 ; [1982] FLC 91-246 draw a distinction between contributions made by one of the parties at the commencement of a long marriage and a contribution made towards the end. Although there may be a distinction between a contribution made by a party at the

commencement of a marriage and a contribution such as an inheritance or damages award which is made in the early years of a marriage, nevertheless the passage of time is the element which reduces the significance of initial or early contributions. For this reason it is clear that the character and significance of the contribution changes as the period of cohabitation lengthens, with initial or early contributions gradually diminishing with the passage of time. As was said in Crawford:

> *The rate of diminution and, for that matter, the significance of the initial contribution, are matters which will vary according to the circumstances of each case.*

It is therefore necessary that trial judges weigh and assess the contributions of all kinds and from all sources made by each of the parties throughout the period of their cohabitation and then translate such assessment into a percentage of the overall property of the parties or provide for a transfer of property in specie in accordance with that assessment.

It really comes down to questions of weight. While weight would and must be given to a contribution which a party makes shortly before the separation, less weight may be given to a contribution made by one of the parties to a marriage early in the cohabitation period of a long marriage, particularly in circumstances where the contribution has gone into the parties' assets or been used up in the payment of family expenses.

In our opinion, in most cases, a damages verdict arising from a personal injury claim, whenever received, is a contribution by the party who suffered the injury. It should not be considered in isolation, for the reason that each and every contribution, which each of the parties makes to the relationship, must be weighed and considered at the same time.

In our opinion, the manner in which the trial judge, in effect, quarantined the Thomastown unit as a contribution made solely by the wife because of her compensation award, has resulted in the wife receiving substantial credit for all her contributions, with the husband receiving minimal credit for his.

On p 16 of the appeal book, having found, as we have said, that the wife's damages award was to be regarded as a contribution made by her, his Honour then made the following comment:

> *It is analogous in my opinion to an inheritance received late in the marriage or, indeed, to a lottery win or some other windfall that may be acquired by one of the parties outside the joint "contract" between them and I use the contract in an analogous sense, not as a factual one, as to their division of labour within the marriage.*

> *It is incorrect in our view to regard inheritances or lottery wins as "windfalls" in the manner which his Honour suggests. In the* ***Marriage of Kessey*** *(1994) 18 Fam LR 149 ; [1994] FLC 92-495 the Full Court held that in most cases an inheritance is to be regarded as a contribution by the party in whose favour or from whose family the benefit was received…"*

There is another well-known and extremely pertinent passage in this judgment from Kay J referring to the "gold bar" scenario. His Honour stated in respect of the trial Judge in **Aleksovoski's** case as follows:

> *"What his Honour had to assess by way of contribution was 18 years where each party provided their labours towards the acquisition, conservation and improvement of assets, and towards the welfare of the marriage generally. Additionally, late in the marriage, the wife received a large capital sum arising out of a motor car accident. In my view whether the capital sum was acquired early in the marriage, in the midst of the marriage or late in the marriage, the same principles apply to it. The judge must weigh up various areas of contribution.*
>
> *In a short marriage, significant weight might be given to a large capital contribution. In a long marriage, other factors often assume great significance and ought not be left almost unseen by eyes dazzled by the magnitude of recently acquired capital.*
>
> *A party may enter a marriage with a gold bar which sits in a bank vault for the entirety of the marriage. For 20 years the parties each strive for their mutual support and at the end of the 20 year marriage, they have the gold bar. In another scenario they enter the marriage with nothing, they strive for 20 years and on the last day the wife inherits a gold bar. In my view it matters little when the gold bar entered the relationship. <u>What is important is to somehow give a reasonable value to all of the elements that go to making up the entirety of the marriage relationship.</u>*
>
> *<u>Just as early capital contribution is diminished by subsequent events during the marriage, late capital contribution which leads to an accelerated improvement in the value of the assets of the parties may also be given something less than directly proportional weight because of those other elements.</u>*
>
> *It was submitted by counsel for the wife and conceded by counsel for the husband that there was a peculiarly personal element to the wife's contribution because much of her money was compensation for her pain and suffering. This was an important matter for his Honour to consider but it had to be properly weighed together with the other significant factors in this case and ought not have been overwhelmingly decisive.*

16. ***Harrington & Harrington*** [2007] FamCA 451

This was a Full Court appeal from the Family Court in relation to a 30 year marriage where the parties lived together for a further eight years after separation. The wife received 3 inheritances including $503,000 about two years prior to commencement of separation under one roof, from the parties' eldest child who took his own life at age 27; a $22,000 inheritance from her late auntie and a property worth $280,000 from her late mother. The total inheritances amounted to over $800,000 within a pool of $2.8 million. The trial Judge divided the property 60/40 in favour of the wife based on her contributions being greater but then made a 7% adjustment back to the husband by way of section 75 (2) factors resulting in an overall adjustment of 53/47 in favour of the wife. The wife appealed on the basis that the contributions adjustment was inadequate and the needs adjustment was excessive.

The wife was 62 years and the husband was 66 years of age. Based on a 60/40 contributions adjustment the wife would have $560,000 more than the husband. The 7% adjustment proposed for section 75(2) factors was primarily to redress this imbalance and bring it back to a disparity of $168,000. The trial Judge had considered that in all the circumstances, such a "needs" adjustment would be just and equitable overall.

The Full Court rejected the argument of the wife that the trial Judge failed to have regard to the impact of that adjustment upon the wife's earning capacity in terms of the reduction in her investments. The Full Court found that it was well within the trial judge's discretion to make a 7% adjustment in the husband's favour, even when the only factor under section 75(2) favouring him was the large disparity in asset holdings otherwise brought about by the 60/40 contributions assessment in favour of the wife. It was noted that such discretion was not outside the range, even though the husband had a higher income than the wife ($70,000 per annum versus her $40,000 per annum). Accordingly the wife's appeal was dismissed with costs.

The salutary lesson from this case appears to be that there does not need to be any extraneous disparity in the section 75(2) needs of the parties. A mere imbalance in the contributions-based assessment between the parties (particularly where that imbalance is brought about by inheritances received by one party) is enough to attract the operation of section 75 (2) "needs" arguments as a way of counter-balancing the disparity in contributions.

17. ***Elgabri v Elgabri*** [2009] FamCA 227

This was a 25 year marriage, where the husband inherited $527,000 late in the marriage. Coleman J found that both parties had made equal contributions of a

financial and non-financial nature to the non-inheritance pool and treated the $527,000 as a separate pool of the husband. His Honour then made a further 7.5% adjustment to the wife in relation to the non-inheritance/joint pool on the basis of the benefit/financial resource represented by the inheritance retained by the husband.

18. ***Mistle v Mistle*** [2010] FamCA 29

This was a 23 year marriage involving to medical practitioners. Both parties owned assets at the commencement of cohabitation and at the time of separation the asset pool was $4.2 million. Following separation the husband received an inheritance of $9.5 million. Le Poer Trench adopted a "two pools" approach, separating the inheritance held by the husband from the rest of the assets and dividing the joint asset pool of $4.2 million as to 80/20 in favour of the wife.

The husband was 62 years of age and the wife 55 years of age. The wife had a medical condition which limited her to working only 20 hours per week. The children were all adults living with the wife and undertaking tertiary education. For these and various other reasons the court concluded that there needed to be a substantial adjustment under section 75(2) in favour of the wife. The husband sought an adjustment of 5% and the wife sought an adjustment of 40%.

Contributions had been assessed at 60/40 in favour of the husband. In making its own assessment as to an adjustment under section 75(2) the Court actually awarded a 40% loading on the joint asset pool excluding the inheritance, which was what she was seeking (i.e. an overall adjustment of 80/20 to the wife).
In making that adjustment, the Court noted that "the husband retains assets from his mother's estate of $8.9 million and this sum is more than twice the available property in the matrimonial pool". The effect of the judgement was that the husband received his inheritance plus a further $827,597 (a total of more than $9.7 million) and by contrast the wife received approximately $3.3 million net.

It is noted that the proportion of each party settlement in dollar terms was roughly equivalent to the proportions in which the joint asset pool stood as compared to the inheritance, namely 1/3 versus 2/3.

19. ***Ross and Audley*** [2011] FMCAfam 280

In this case Bender FM (as her Honour then was) made orders adjusting property between parties after a 20 year marriage and four children in circumstances where 97% of the over $3 million property pool was attributable to an inheritance by the wife from her late mother. The husband was seeking

equal division in the wife sought orders for 80/20 in her favour. The wife was 52 years and the husband was 57 years of age respectively. The husband was employed earning $60,000 per annum and the wife was engaged in home duties, caring for children. Her Honour referred to the case of the Bonnici & Bonnici [8] where the Full Court said (in respect of an inheritance received 6 months prior to separation in that case) as follows:

> "*the other party cannot be regarded as contributing significantly to an inheritance received very late in the relationship and certainly not after it has terminated, except in very unusual circumstances. Such circumstances might include the care of the testator prior to death by the husband or wife as the case may be or other particular services to protect property".*

The wife's inheritance was received some 4 years prior to separation in this case and the court was satisfied that there should be an adjustment of 25% in favour of the wife where the contributions were otherwise equal, aside from the inheritance. The husband was employed but had the care of the 15-year-old daughter of the relationship without financial support from the wife, who was unemployed and had some mental health issues. The court therefore made no adjustment in relation to section 75 (2) factors and found an overall adjustment of 75/25 in favour of the wife to be just and equitable.

20. ***Sinclair & Sinclair*** [2012] FamCA 388

This is a decision of Cronin J delivered at the Family Court in Melbourne and dealing with very significant inheritance contributions by the wife, namely most of the $7M+ pool. The Court was required to assess contributions and section 75 (2) factors and decide on the best approach to be taken, not only as to the assessment of those factors but the weight each factor was given.

The marriage was at least 10 years but potentially up to 26 years, with this being a very significant issue in dispute. The wife controlled the majority of the asset pool being approximately $7.1M which she inherited from her father many years before trial. The husband had $194,000 inclusive of a partial settlement in the sum of $50,000.

In assessing contributions, the court noted that the inheritance was received a long time ago and therefore the current wealth is a reflection of the "springboard effect". However the court also found that the contributions to the portion of the pool represented by the non-inheritance assets were equal as between husband and wife. His Honour found that about three quarters of the pool was unrelated to the direct contributions of the parties themselves, but he divided the other one quarter of the pool equally (half of 25% each).

[8] Ibid

In addition to the husband receiving a contributions-based entitlement of 12.5%, (which, in addition to the monies held by him already would give the husband approximately $812,000) the court considered it appropriate to make a further adjustment to the husband under section 75(2) on the basis that there was no evidence the husband could continue to live in a reasonable standard similar to what he was currently living if that was the total of his resources. The Court took the view that it was fraught with difficulty to make a further percentage adjustment in a pool of that size and accordingly made a pragmatic dollar value adjustment, awarding a further $200,000 to the husband to assist him in obtaining secure housing and having some income support stream for the years ahead.

Cronin J found that such an outcome was just and equitable as it stood, without any further adjustment. The Court also declined to make an additional order for spousal maintenance on the basis that the settlement of over $1,000,000 would enable the husband to support himself adequately without an additional spouse maintenance order.

21. ***Jarrott & Jarrott (No.2)*** [2012] FamCAFC 72

This is a Full Court decision of the Family Court where the husband appealed against orders for property settlement, where the trial Judge determined the property of the parties to the marriage to be worth $2,182,917 net, however this sum included the husband's post separation inheritance from his mother's estate of $110,000. The husband appealed and submitted that such is inheritance sum should be excluded from the asset pool. Although the Full Court did not accept that the trial Judge erred by a including the inheritance in the pool, it did consider for the purposes of re-exercising the discretion that it would be preferable to treat the inheritance as a separate pool, because it was received after separation of the parties and the wife made no contribution direct or indirect, financial or non-financial, to its acquisition, conservation or improvement.

In excluding the inheritance from the main pool and treating it as a separate pool, the Full Court said "however viewed, and at whichever step it is considered, the significance of the inheritance ultimately turns on its impact as a financial resource [9] of the husband pursuant to section 75(2) of the Act". The Full Court ultimately ordered only a modest adjustment pursuant to section 75(2)(o) on a global basis to the wife.

[9] It is noted that the court's description of the husband's inheritance as a "financial resource" in this context is probably figurative as is technically not correct. Clearly the inheritance falls under the definition of "property" and had been treated as such by the court when being placed in a separate pool.

22. ***Bloom & Bloom*** [2014] FCCA 1882

This is a case where the parties had a 20 year marriage with children (still in the wife's care, albeit teenagers at the time of hearing). The major issue in dispute was what if any adjustments should be made for the husband's enormous initial contribution at the commencement of marriage. The husband sought a 20% adjustment. The Court acknowledged that although the contributions were made a long time ago, the parties' ultimate wealth did spring uninterrupted from that initial contribution in that it was the unencumbered property which basically enabled the parties to buy the next property, which enabled them to buy the business. However the latter assets appreciated significantly due to the efforts of both parties.

The court ordered a 12% adjustment to the husband on contributions but then made a subsequent adjustment to the wife for 7% in relation to section 75(2) factors due to her lack of employment, despite best efforts, and care of teenaged children. The overall adjustment of 55/45 to the husband was found to be just and equitable in the circumstances. This case is a good example of where the impact of an early windfall can be offset by subsequent contributions and needs.

23. ***Widmann & Widmann*** [2017] FamCA 602

This is a recent decision of the Family Court handed down in Sydney in July 2017 by Stevenson J. It related to parties in a relationship at 22 years, producing three children. Approximately six years after separation the husband received a substantial inheritance from his late father. Up to that date the parties' contributions overall had been equal. On the basis that there was no adjustment for section 75(2) factors, a contributions-based adjustment was made 65/35 in favour of the husband.

The court held that it would not be just and equitable to quarantine the husband's inheritance by adopting a two pool approach. Instead the court took a global approach and divided the entire net assets and superannuation in the proportions as stated.

This case is particularly interesting because it involves adult children with the parties in their early 60s. Although the inheritance was significantly post-separation, the fact of the court's refusal to dismiss the wife's application for adjustment of the husband's inheritance monies (which the husband unsuccessfully argued it should do under the principles of *Stanford*) following a relationship of 22 years, is very telling. The Court's approach here seems very much to focus on the balancing of all of the different kinds of contributions after

a long relationship, rather than focusing on only recent larger contributions at the expense of such a balancing exercise, to achieve justice and equity.

The Court found the parties' superannuation and non-superannuation assets to be valued at $1,187,500 net. Despite the husband claiming that he received $1,460,482 from the estate of his late father, not all those funds were represented in the pool at the time of hearing although a share portfolio worth $357,000; a property worth $600,000 and some smaller cash holdings of the husband would suggest that the overwhelming majority of the pool was made up by contributions from his inheritance. The reasoning for the court's rejection of a two pool approach was given as follows:

> "*the adoption of the two pool approach would result in minimal recognition of the contribution made by the wife, to which the husband admitted, during the parties cohabitation*"

On the other hand, in balancing the need to take a global approach (to give proper recognition to the wife's contributions over a long marriage) against the husband's post-separation and overwhelmingly significant financial contribution the court found as follows:

> "*In my view, the fact that the husband received a substantial inheritance approximately six years after the parties' separation is a matter of considerable relevance to contribution. This factor obviously must weigh in husband's favour in a meaningful manner and attract proper recognition. In all of the circumstances I assess the contributions of the parties as at the date of trial to be 65% to the husband and 35% of the wife*" [at 82-83].

24. ***Calvin & McTier*** [2017] FamCAFC 125

This is another recent decision handed down in July 2017 by the Full Court of the Family Court in relation to the treatment of property acquired by the husband 4 years after separation by way of inheritance.

The trial magistrate (in the WA Family Court) made orders dividing all of the property of the parties including the husband's inheritance on the basis of 65/35 to the husband. The husband appealed solely on the question of whether the inheritance should have been included amongst the property to be divided. This was an eight year marriage producing one child who had been in the equal week-about care of the parties since separation. The husband made greater contributions at the commencement of the marriage being two properties, a car, shares and superannuation. Both parties had personal effects. At the time of hearing the non-superannuation assets were $620,000 and a superannuation assets were $290,000 being a pool of around $910,000. The remainder of the husband's inheritance, after various expenditure, was $430,686 at the time of trial. The trial magistrate added this amount to the joint pool such that the

husband's inheritance amounted to approximately 32% of the joint pool inclusive of that inheritance.

The lower court found that the contributions of the husband (taking into account financial contributions at the commencement of cohabitation and following separation) was significantly greater than those of the wife and assessed the contributions based entitlements as 75/25 in favour of the husband. A further adjustment of 10% was made to the wife to reflect her section 75 (2) factors.

The husband challenged the degree of connection between the inheritance and the parties' matrimonial relationship. The court dismissed that challenge on the basis of the mere definition of matrimonial cause and property in section 4 of the Act which refers to "***property of the parties to the marriage or either of them***" and defines property as "***in relation to the parties to a marriage or either of them — means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion***…"

The husband also argued that Stanford's case required the Court to have a "principled reason for interfering with the existing legal and equitable interests of the parties of the marriage" and that on the basis of such principle, the court would have to be satisfied that there is a sufficient nexus between particular items of post-separation property and the joint matrimonial property, before it could be included for division between the parties.

The court held as follows:

> "*in our opinion, Stanford does not support the submissions of the husband. That case was concerned with the conditions to be satisfied before the court should consider altering the parties' interest in their property…. There is nothing in Stanford to indicate that after-acquired property is to be treated in a different way and that a specific and separate determination as to its inclusion is required… The question in Stanford was whether there should have been an order for property division at all. It was not concerned with the nature of the actual order that was made…"*

In Calvin's case therefore, the following themes and principles are reiterated:

- the court most certainly does have power to make an order in relation to property acquired after separation (for example inheritance property); and

- the decision as to whether to make an order dividing the inheritance property is a matter of discretion.

25. ***Holland & Holland*** [2017] FamCAFC 166

This is another appeal in a case of post-separation inheritance decided very recently, having been handed down by the Full Court last month, August 2017. Her Honour Judge Jones of the Federal Circuit Court in Melbourne made final property orders between married parties who cohabited for 17 years and had two children aged 14 and 17 years at the time of trial. The Court held that the trial judge erred when describing and treating the husband's inheritance as a financial resource of the husband to be excluded from the pool. The Full Court found that:

- Orders pursuant to section 79 can alter interests in respect of property but financial resources cannot be the subject of such orders;
- Although the term "financial resource" has sometimes been used to describe a situation where property the subject of an inheritance has been assessed within an "asset by asset" or "separate pool" approach, the expression financial resource should be confined to those interests which do not fall into the definition of property;
- Her Honour erred in referring to the husband's vested interest in his inheritance as a "financial resource" when in fact it was divisible property under s.79;
- The use of the term "financial resource" was not just infelicity of expression but that it also infected the legal reasoning adopted when deciding the matter, as her Honour adopted an "asset by asset" approach excluding the husband's inheritance as an asset to be included in the property of the parties — and this was not consistent with the accepted legal approach; and
- All property of the parties or either of them should be treated as property available for distribution under section 79. Certain items of property can be treated as held in "separate pools" in the discretion of the court, but anything meeting the definition of "property" cannot be excluded from consideration and/or re-characterised as a financial resource, when it is in fact property.

26. ***Hurst & Hurst*** *[*2018] FamCAFC 146

This is a very recent matter heard by the Full Court in August 2018, whereby an appeal from a decision of Carew J was allowed and the matter remitted for re-hearing by a different judge. The wife appealed final property order made at trial following a 38 year marriage with 4 children (including one adult son with psychiatric issues still living with the wife) and the youngest child age 13 living with the wife. The other 2 children were independent adults.

At the time of trial the wife was age 56 (in receipt of Centrelink benefits) and the husband was aged 66 years (working in a professional role on a modest net income of $37,000 per annum, and paying little or no child support).

The main issue was the significant increase in value of land inherited by the husband 14 years prior to trial (then worth $400,000) but which had increased in value to $1.82M at trial. That represented about 60% of the pool of $2.66M. The trial judge assess the contributions as 72.5% in favour of the husband, adjusted back by 12.5% having regard to the wife's section 75(2) factors; resulting in an overall 60/40 division in the husband's favour. In coming to that conclusion, the trial Judge found that the wife had not made any direct contribution to the inherited land; only indirect contributions toward the cost of rates and grass slashing.

The Full Court found the trial judge to be in error, by purporting to take into account wife's contributions of all kinds — made throughout the marriage, both prior to and since the receipt of the inheritance by the husband — in relation to everything but the inheritance. The Full Court found that when adopting a global approach to assessment of contributions, as the trial judge purported to do, there was a significant risk of ignoring important contributions made by both parties to assets *other* the inheritance property, i.e. assets to which their contributions do not necessarily have a direct nexus and that her Honour fell into error over risk.

The Full Court found that it was not open to the trial judge on the evidence, to distinguish between "categories of contributions" made by a party to "inherited property" and "categories of contributions" made to "other property":

> *[25] The contributions made to the conservation of the [inherited] property were of precisely the same nature and extent as the contributions that each made in their respective agreed roles and spheres for the 25 years prior to the contribution of the property and for the 13 years subsequent to it… [27] Each contributed to the best of their ability and in their differing ways within their respective roles or spheres.. [32] We consider that her Honour's error in the assessment of contributions wreaks an injustice upon the wife".*

The Full Court also found that there are a number of section 75 (2) factors which the trial judge did not adequately consider or take into account and that her Honour erred in so doing. The success of this appeal serves only to confirm the fact that the assessment of contributions in inheritance cases remains a very difficult practical exercise and that lawyers need to pay close attention to the key principles guiding us in this area of jurisprudence, when applying the law to any given fact scenario.

A key principle arising from this case appears to be that global assessment of contributions to the whole of the asset pool (including an inheritance):

- does not require a physical direct or indirect nexus between the contributions of a party and a particular item of property (such as the inheritance); and
- does not depend upon the timing of contributions (and can include contributions made prior to, or after, the acquisition of the inheritance).

CONCLUSION

27. The following is a summary of the "take-home" messages from the above case law analysis, which might assist you in navigating inheritance cases and advising your client's when these issues arise:

27.1. Property is widely defined in the Act; all property of both parties, whether acquired during the marriage or after separation (and regardless of how it came to be received) must be included in the pool available for distribution, for consideration;

27.2. Property cannot be re-characterised as "a financial resource" if in fact is falls under the definition of property. This is a position often (incorrectly) adopted by a party in a misguided attempt to remove their contentious property from consideration as a part of the overall property pool.

(Eg). An inheritance after separation is still property and must be included and valued within the pool available for division.

(Eg). A remainder interest under a Will, which legally speaking is "property in reversion" under the definition in s.4 of the Act and can be sold or transferred. It must be valued as to the underlying asset/s value and then valued by an Actuary (to arrive at a current market value for family Law asset pool purposes, taking into account the age of the party and the likely date of the interest reverting) and included for consideration in the pool.

27.3. There is no legal basis for the proposition that an inheritance received late in the marriage should be automatically placed in a separate pool or treated differently. On the contrary it remains property of the parties or either of them and represents just another kind of contribution. It is a matter for the court's discretion as to whether it adopts a global approach to the asset pool, or whether it adopts an "asset by asset" or "multi-pool" approach. On any view the overall contributions to the pool/s should be properly weighted and assets should not be quarantined from consideration when assessing contribution-based entitlements.

27.4. There is no blanket principle that a late inheritance or windfall to one party should be "excluded" from the asset pool or from consideration in the five-step process. On the contrary, it must be included in the pool because it falls under the definition of property under the Act.

27.5. Focusing too much upon the significance of an inheritance (particularly lays in a longer marriage) and treating it as a separate pool to which one party has made no contribution, should be done cautiously to ensure that earlier important contributions (including homemaker and parenting contributions) are not ignored or given insufficient weight.

27.6. The safer approach appears to be that all of the contributions of a party to all of the assets available at the time of hearing, should be assessed in their totality and given proper overall weighting. It makes no difference whether a party contributed directly/indirectly to the acquisition of all of the assets or only some of the assets. The fact that a party may not have contributed to a particular asset does not justify that asset being excluded or treated differently. A global approach necessitates an assessment of all contributions as against all assets.

27.7. Generally speaking, recent inheritance cases tend to adopt a more global approach to assessment of contributions, and a less mathematical approach. Assessment of contributions is becoming less "tied" to the concept of contributions to a particular asset, and more holistic, particularly so as to avoid undervaluing family welfare contributions which are not of their nature necessarily tied to a particular asset. Longer marriages with children lend themselves very much to this increasingly holistic approach by the courts.

27.8. The Court is bound to give "reasonable value to all of the elements that go to making up the entirety of the relationship".

27.8.1. Introduction of capital early in a relationship may be given diminished significance (in terms of weighting of contribution) after a significant passage of time involving many and varied subsequent contributions by both parties[10].

27.8.2. The cases are increasingly pointing toward fact that the principle in Pierce's case can work in reverse and that recently introduced capital may be given less than directly proportional weight, having regard to the history of competing contributions by the other party.

[10] See: **Pierce & Pierce** (1998) Fam CA 74 where the Full Court said:

[28]. "In our opinion it is not so much a matter of erosion of contribution but a question of what weight is to be attached, in all the circumstances, to the initial contribution. It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife. In considering the weight to be attached to the initial contribution, in this case of the husband, regard must be had to the use made by the parties of that contribution. In the present case that use was a substantial contribution to the purchase price of the matrimonial home"

28. We should all therefore be mindful when advising our clients that an inheritance is not, after all, a "special" type of contribution, even if it is made late in the marriage or after separation. It is just another contribution in the mix, to be considered in the totality of the circumstances. Whilst in a short marriage a significant inheritance will be given considerable weight, in a longer marriage particularly where there are considerable counterbalancing contributions, including but not limited to parenting and homemaker contributions, the fact that the inheritance has been received late in the marriage will still not elevate it to a special category of asset (and it most certainly will not be excluded from the pool). On the contrary, the case law in the last 5 years leans much more toward a greater focus on what is overall just and equitable. As a result there seems to be an **increasingly lower disparity in percentage outcomes** between parties to these "late inheritance" cases, than there was in the 25 years prior.

29. Accordingly we should not be overzealous when advising our clients in relation to the significance the Court will attach to their (or their former spouse's) recent inheritance. We should dispassionately consider all of the facts and circumstances of the case and make a frank assessment of the realistic likely outcome for our client if the matter were to be decided by the Court, having regard to the case law.

30. If in doubt, consider briefing experienced family law counsel for advice, particularly if your opponent (or indeed your client) is overzealous. This is often a cost-effective way of ensuring that your client is receiving robust, expert advice in a timely manner. It can also be helpful in assisting you to develop a realistic and compelling Calderbank Offer to keep the other party under pressure and moreover, it may assist you resolve these (often tricky) cases, without the need for costly litigation.

MICHELE J. BROOKS

BARRISTER & MEDIATOR

Owen Dixon Chambers East

12 October 2018